

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: NELSON RODRIGUEZ Z 104 42 6584

DECISION OF THE VICE COMMANDANT ON REVIEW
UNITED STATES COAST GUARD

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Nelson Rodriguez

This review has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.35 and the party involved is given the status of Appellant.

By order dated 10 September 1979, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for nine months, plus nine months on twelve months's probation, upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board the United States cable ship LONG LINES under authority of the document above captioned, on or about 29 August 1979, Appellant wrongfully assaulted and battered the chief mate of the vessel and wrongfully assaulted and battered the third mate with, on distinct occasions, his fist and with a sharpened pencil.

The hearing was held at San Diego, California, on 6 September 1979. Appellant was not present when the hearing opened, as scheduled, in the hearing room of the Coast Guard Marine Safety Office, San Diego. A motion to proceed in absentia was granted and the Investigating Officer introduced into evidence, after pleas of not guilty had been entered on behalf of Appellant by the Administrative Law Judge, the testimony of three witnesses, records of LONG LINES, and one item of real evidence.

The Investigating Officer thereupon rested his case and the Administrative Law Judge announced that the charge and specification had been proved. Appellant's prior record was received into evidence.

At this time the hearing was recessed to ascertain whether Appellant, who was in the San Diego County Jail, could appear.

The hearing was reopened at the Jail that afternoon and Appellant made "an unsworn statement in mitigation."

OPINION

It is obvious that when the hearing opened and the motion to proceed in absentia was granted it was known that Appellant's presence was precluded by his incarceration. From the fact that Appellant was taken into police custody on removal from his vessel on 29 August 1979, the date of the alleged offenses, it is inferable even that he was in the County Jail at the time the charges were served on 30 August 1979.

There is no need here to attempt a survey of conditions under which it would be appropriate (say, e.g., an intervening arrest and detention of a person charged on another matter, without the knowledge and cooperation of Coast Guard officials) to perceive a responsible foregoing of a right to appear for his hearing by a person charged. In this case it is clear that, very simply, advantage was taken of his condition to conduct the substantive proceedings without him.

The very process of appearing to confer a benefit reconvening in the afternoon at the county jail is a self-confessed empty gesture since the fiction of "reopening" the hearing did not carry even a hint that the findings already made were in the slightest premature. By the time Appellant was given opportunity to make his "statement in mitigation" the charges had been found proved and remained so without disturbance throughout the procedure followed.

I do not say here that given the apparent circumstances there was not available a variety of means of according Appellant a proper hearing with due according of procedural benefits. The method chosen just did not do it. The "hearing" was a nullity.

CONCLUSION

I conclude that Appellant was denied due process of law when the substantive proceedings were held at a time and a place at which it was known he could not, by reason of prior restraint, appear, when, as the continuation of the hearing established, the case could have been heard at the place of confinement, and when the judgment had already been entered and was maintained even when the apparent benefit of personal presence was accorded to him.

ORDER

The order of the Administrative Law Judge dated at Long Beach, California, on 10 September 1979, is VACATED. The findings are SET ASIDE, and the charges are DISMISSED WITHOUT PREJUDICE.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 10th day of June 1981.